SUPREME COURT, U. S.

FILED

In the Supreme Court of the United States

OCTOBER TERM, 1970

ANTHONY JOSEPH CIMINI, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN O'MALLEY, PETITIONER

v.

UNITED STATES OF AMERICA

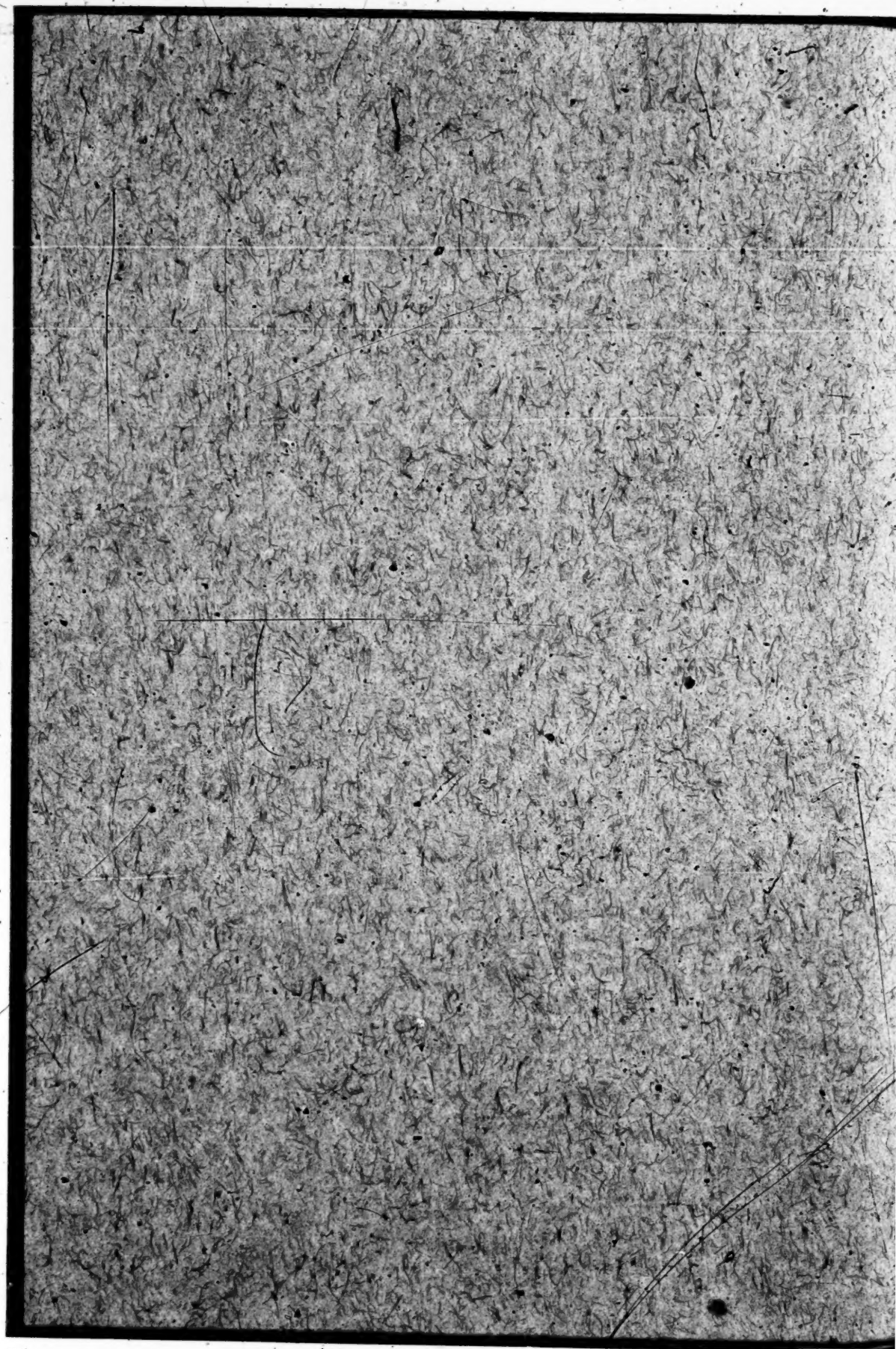
ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WM. D. RUCKELSHAUS,
Assistant Attorney General,

ROBERT A. PARKER,
Attorney,
Department of Justice,
Washington, D.C. 20530.



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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 520

ANTHONY JOSEPH CIMINI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 521

JOHN O'MALLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 520 App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1970. A petition for rehearing was denied on July 13, 1970. On August 10, 1970, the petitions for writs of certiorari were filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether during the course of the trial the court properly denied petitioners' motions for mistrial on the ground that some jurors had been exposed to newspaper publicity, where on individual interrogation each juror had indicated that such exposure would not affect his ability to render an impartial verdict.

2. Whether the trial judge properly declined, during the jury's deliberations, to hold a hearing on petitioners' motions for a mistrial based upon allegations that the jury had been exposed to a prejudicial newspaper article appearing the previous night.

3. Whether the trial judge, *sua sponte*, should have held a hearing to determine whether the prosecution had provided information contained in the latter newspaper article.

STATEMENT

After a jury trial, petitioners were convicted in the United States District Court for the Eastern District of Michigan of conspiracy to steal from interstate commerce (18 U.S.C. 371) and of possession of property stolen from an interstate shipment (18 U.S.C. 659). Petitioner Cimini was sentenced to concurrent

terms of four years' imprisonment; petitioner O'Malley was sentenced to concurrent five-year prison terms. The court of appeals affirmed (Pet. No. 520 App. A).

1. During the week-end recess following the first week of trial[1] an article relating to defense attorney Carl Ziemba appeared in one of the Detroit daily newspapers. After motions for a mistrial were made, all the members of the jury assigned to try the case were individually questioned by the trial court. Each denied reading the article. One female juror stated that her husband had read a portion of it to her. The questioning further revealed that there was some discussion of the article among certain of the jurors and nine members of the jury were aware of this discussion. The conversation was apparently very brief and was limited to the fact that one of the defense attorneys had been a prosecutor. There was a favorable comment on the intelligence of one defense attorney, presumably Mr. Ziemba. Every juror affirmatively stated that the discussion had not impaired his ability to render a fair and impartial verdict (Tr. 514-537). Based on this showing, the district judge denied the motions for a mistrial.

2. The jury began its deliberations on a Wednesday afternoon (T. 1118). At 3:40 p.m., the jury requested supplemental instructions as to the counts with which each defendant was charged. At this point the jurors

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[1] The trial lasted three weeks and is reported in 1218 pages of transcript, herein designated "Tr." No issue is raised concerning the sufficiency of the evidence.

had apparently elected a foreman (T. 1121). The supplemental instructions were given and the jury was excused for the day at approximately 5:00 p.m. The trial judge admonished them not to read the newspapers or listen to anything on radio or television about the case and to resume their deliberations at 9:00 a.m. the following morning (Pet. No. 520 App. D, 7). At 8:00 p.m. that night, a short article was published on page 14-A of a Detroit daily paper under the caption "Jury Out In TV Hijack Case."[2] The article cited the fact that the instant case was Mr. Ziemba's first since leaving the prosecutor's office to "join the law firm noted for its defense of Mafia figures." It also referred to Anthony Cimini as having been named a "Mafia" member by a former Detroit Police Commissioner in a 1963 hearing before a Senate Subcommittee and said that he had previously been convicted of interstate shipment of stolen securities in a case which was then pending on appeal. (see Pet. No. 520, p. 5, App. D, 8-9). At 9:02 a.m. the following morning, the judge received a note from the jury requesting the names of the defendants and their attorneys (Pet. No. 520 App. D, 7). The court considered the request in chambers with counsel and determined not to grant it. During that time, the court received a further note indicating that the jury had reached a verdict (Pet. No. 520 App. D, 6-7).

At this point the district court asked for suggestions from defense counsel. Mr. Ziemba inquired

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[2] We are lodging a copy of this newspaper with the Clerk of this Court.

whether it was implicit in the Court's instructions to the jury the evening before that they should not resume deliberations in the absence of all twelve jurors. The court responded affirmatively. Mr. Ziemba then stated that he had seen juror No. 12 first arriving in the building at 9:25 a.m. that morning. He argued that this indicated that the other eleven jurors had disobeyed the court's instructions not to resume deliberations in light of the note sent by the jury at 9:02 a.m. After calling the court's attention to the newspaper article which had appeared the previous evening, Mr. Ziemba argued that the only fair inference which could be drawn from the jury's note requesting the correct spelling of the defendants' and their attorneys' names was that members of the jury were giving improper consideration to the newspaper article. He moved that a mistrial be declared. Attorneys for other defendants joined in the motion and moved that the jurors be examined as to whether they had read the newspaper article. After a colloquy, the trial court denied the motion to examine the jurors and to declare a mistrial pointing out that it had continuously admonished the jury not to read the papers or listen to television or the radio (Pet. No. 520 App. D, 7-14).

ARGUMENT

1. Petitioners contend that the trial judge erred in refusing to grant a mistrial after several of the jurors indicated in an individualized *voir dire* examination during the trial that they had discussed an allegedly prejudicial newspaper article. During that

voir dire, however, each juror stated that the discussion did not relate to the case and would not affect his ability to render an impartial verdict. The court below found that "[a]t worst the publicity was no more than mildly adverse" (Pet. No. 520 App. A, 2). However characterized, it was not so inherently prejudicial as to cast doubt upon the jurors' assurances; accordingly the denial of the motion for a mistrial was not an abuse of discretion. See *Marshall* v. *United States*, 360 U.S. 310, 312; cf. *United States* v. *Solomon*, 422 F.2d 1110, 1117-1119 (C.A. 7), certiorari denied *sub nom. Sommer* v. *United States*, 399 U.S. 911.

2. Petitioners contend that the denial of their motions for mistrial or to examine the jurors based upon the article which appeared during the jury's deliberations was erroneous. There was, however, no showing that any juror had read or been exposed to this article. In view of the court's specific admonition to the jurors the previous night to avoid such exposure—an admonition made repeatedly during the trial—and the prior incident in which they had all been questioned following their discussion of a prior newspaper article, it is fair to conclude that the jurors had been impressed with the importance of performing their function without consideration of out of court publicity. Petitioners attempt to undermine this conclusion by contending that the jury's note sent at 9:02 a.m. the following morning (at a time when one of the jurors had not yet arrived), showed that the jury was interested in checking on whether the persons mentioned in the article were the same as those involved in the

trial. The jury, however, had been told not to resume deliberations until all twelve jurors were present. It is thus more reasonable to infer that this instruction was followed and that the note sent at 9:02, before the arrival of the twelfth juror, had been prepared the previous afternoon pursuant to an agreement that it be communicated to the court the next morning. Five defendants were on trial, each represented by a different attorney. The jury had previously requested instructions as to which defendant was charged with which counts, and the logical assumption is that the morning request sought further clarification along the same lines. The contention that the jury must have read the newspaper article was nothing more than tenuous speculation and, under all the circumstances, the trial judge was justified in believing that the jury had followed his repeated specific admonitions about press publicity. See *Frazier* v. *Cupp*, 394 U.S. 731, 735.[3]

3. During the colloquy on the second motion for a mistrial, one defense attorney suggested that the prosecutor may have caused the release of the newspaper article which was the subject of the motion. The attorney alleged that on the previous day in the courtroom hallway he had seen the prosecutor talking

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[3] Petitioners' reliance upon decisions from other circuits as establishing a conflict on this issue is not well taken. The Seventh Circuit decisions cited (Pet. No. 520, 9-10) dealt with prejudicial publicity during trial and the requirement that the trial court interrogate the jurors as to whether they heard or discussed the publicity. The other circuit decisions cited are equally distinguishable on their facts (see Pet. No. 520, 10).

to the reporter who had written the article. According to the attorney, the reporter had a copy of the indictment as well as the names and addresses of the defendants; the reporter asked the prosecutor whether he had all the pertinent information in this matter; and the prosecutor responded affirmatively and told the reporter that he could turn in the story. The defense attorney argued that this demonstrated bad faith on the part of the government necessitating a mistrial (Pet. No. 520 App. D, 11-13).

Petitioners do not contend in this Court [4] that a mistrial should have been granted but argue (Pet. No. 520 10-12) that the trial judge *sua sponte* should have held a hearing to determine whether the prosecutor had caused the story, as it appeared in print, to be released. Cf. *United States* v. *Desist*, 384 F.2d 889, 904 (C.A. 2), affirmed on other grounds, 394 U.S. 244, in which the Second Circuit indicated the desirability of a hearing following the publication of an article during trial referring to one of the defendants as having been "identified by the Govenment as an underworld figure here." The court in *Desist* indicated that a hearing should be held in such circumstances "to find out who, if anyone, spoke for the 'Government,' so that proper measures could be considered, e.g., transmittal of the hearing transcript to the appropriate bar association or to the employee's supervisor." *Ibid.* In the present case there was, however, no indication that a member of the prosecution staff had referred to any defendant in prejudicial terms. The facts alleged

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[4] The issue was concededly not raised in the court of appeals (Pet. No. 520 App. A).

by defense counsel showed only that the prosecutor had told the reporter that he had all the "pertinent information" about the case and "could turn in the story" (Pet. No. 520 App. D, 12-13), not that the prosecutor had read and authorized for release a draft of the article as it appeared.[5] In these circumstances, no hearing was required. Moreover, absent any showing that the jurors read the article, such conduct would not be cause for reversal of petitioners' convictions. See *Desist*, *supra*.

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[5] At the time this charge was made government counsel noted that he did not wish "to take the Court's time to even get into that" (Pet. No. 520 App. D, 13). By this comment he obviously rejected any contention that the government had provided any prejudicial or unauthorized information. In view of the fact that this contention is again being asserted—although it was not raised in the court of appeals—we have made further inquiry into the matter and are satisfied that the only information released to the press was in the standard release made at the time of the indictment—*i.e.* the names, ages and addresses of the defendants, a copy of the indictment and information as to the maximum penalty that could be imposed.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

ROGER A. PAULEY,
Attorney.

OCTOBER, 1970.

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